NO. 83-1536

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JACK A. ELLIOTT, RICHARD GALEN, ROBERT W. HEFFER, GEORGE D. SPRADLEY, MAX TIPTON and C. DUANE THOMPSON,
Petitioners

V.

GROUP HOSPITAL SERVICE, INC.,
Respondent

BRIEF IN OPPOSITION TO PETITIONERS' APPLICATION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW BY PETITIONERS

1. Whether, in an employment discrimination case, the testimony of an employer official that the challenged employment decision was prompted by a non-discriminatory reason must be accepted absent "countervailing evidence that it was not the real reason for the discharge." (Stated otherwise, whether, in an employment discrimination case, the fact-finder (here the jury) is permitted to reject the uncontradicted testimony of an interested employer witness on the basis of its assessment that the witness is not credible.)

2. Whether, in an age discrimination case, evidence that an employer has dismissed a number of highly qualified older employees and replaced them with much younger employees may be considered by the fact-finder, in the absence of a showing that as a matter of probability the pattern is "statistically significant."

3. Whether, in an employment discrimination case, where the plaintiff has introduced evidence establishing a prima facie case and an official of the defendant employer testifies to a facially-rational non-discriminatory reason for the challenged employment decision, the plaintiff bears a "heavy burden" of proof that the proffered reason is pretextual.

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Pursuant to Supreme Court Rule 22, Respondent Group Hospital Service, Inc.[1] submits its Brief in opposition to Petitioners' Application for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit. The Respondent respectfully moves this Court to deny the petition for the review of the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on September 16, 1983, on grounds that the decision of the Court of Appeals represents a proper application of law to the facts in this case and that Petitioners have raised no issues that merit review by this Court.

[1] Effective December 15, 1983, Group Hospital Service, Inc. changed its corporate name to Blue Cross and Blue Shield of Texas, Inc. The Respondent is affiliated with a statewide mutual assessment company known as Group Medical and Surgical Service, d/b/a Blue Shield of Texas. (Supreme Court Rule 28.1)

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered in this case on September 16, 1983. The Petitioners thereafter filed a Petition for Rehearing and Suggestion for Rehearing *en banc*, both of which were denied by the Circuit Court on November 25, 1983. Petitioners have sought a review of the decision of the Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provisions of the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, are as follows:

Section 4(a)(1), 29 U.S.C. § 623(a)(1):

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

Section 12(a), 29 U.S.C. § 631(a):

> The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

This Court's procedural rules indicate that in a responsive brief no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the statement by the other side (Rule 34.4). In this case Petitioners bluntly assert that the Court of Appeals for the Fifth Circuit mischaracterized the record evidence as a means of justifying its ultimate finding that the quality and probative

force of such evidence was patently insufficient to support Petitioners otherwise bald allegations of age discrimination (Petitioners' Brief, page 28, footnote 17). This element of denigration of the Court of Appeals' evaluation of the evidence is unfounded and inappropriate. In their statement of the case Petitioners assert at the outset that they are entitled to a liberal review of the issue of the sufficiency of evidence presented at the district court level, and they thereafter proceed to offer a rendition of purported facts in evidence that could only be characterized as not only liberal, but at times inaccurately self-serving. The Respondent is thus compelled to at least note and reply to specific inaccuracies.

The Petitioners' statement of the case does not challenge the Circuit Court's finding that there was no direct evidence of age discrimination offered by Petitioners at trial (App. 17a).[2] Petitioners concede that the central theory of their case was premised upon allegations of the existence of a "scheme" on the part of the company to get rid of older employees within the Marketing Division and replace them with younger employees (Petitioners' Brief, page 23). This "scheme" was purportedly undertaken during the latter part of the year 1978 because the company's new president-elect, Walter Hachmeister, allegedly asserted that he wanted "new blood" in the Marketing Division and stated "my people are going to have to be lean and mean" (App. 17a). Hachmeister's testimony confirmed that he had used the phrase "lean and mean" in an attempt to urge the initiation of a more aggressive marketing approach—he wanted leaders who had the "ability to get things done" (Tr. 606-607, 898). The words "new blood," however, were attributed to Hachmeister solely by Petitioners (App. 17a).

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[2] For sake of convenience and accuracy, references to the Circuit Court's decision contained in this brief are keyed to the page numbers designated in the reproduction of the Appeal Court's decision reprinted in the appendix of Petitioners' Brief (i.e. Petitioners' Brief, Appendix, pages 1a through 22a).

Hachmeister characterized his perception of the health insurance sales efforts of the company as of the point in time when he was appointed president-elect as something akin to "... a rather placid status much like a large battleship that's anchored in a bay with anchors at both ends and just not going anyplace. ..." (Tr. 900). Hachmeister noted that the company's market penetration in Texas hovered around twenty percent; a figure that he sharply contrasted with other states where Blue Cross plans were selling as much as seventy to eighty percent of the market (Tr. 900).

In October, 1978, Hachmeister asked for the resignation of 43 year old health marketing Vice President Hugh Eller, and replaced him with 56 year old Jim Wilson, the Vice President who had headed the company's separate life insurance sales division (Tr. 913-914). Hachmeister gave Wilson a definitive goal—to increase the company's market penetration to fifty percent within five years (Tr. 917-918). Wilson characterized Hachmeister's directive as "startling"; he knew that the sales performance of the health marketing division had been "very average" for a number of years (Tr. 914-915, 918). Wilson likewise knew that it would not be easy to achieve Hachmeister's goals, and that he would have to move immediately to "put the proper leadership into key roles" (Tr. 918). Thus, the reorganization of the health side of the Marketing Division began (Tr. 918).

The statement of the case presented by Petitioners asserts that the evidence relating to the reorganization undertaken by Wilson clearly reflected a "pattern" of age discrimination. A reader of the statement is led to believe that there were ten executives who worked within the company's marketing hierarchy who were replaced under circumstances giving rise to an inference of age as a motivating factor. A portion of Plaintiffs' Trial Exhibit 141-A is reproduced in the text of Petitioners'

statement of the case in furtherance of Petitioners' pattern of motive argument (Petitioners' Brief, page 3).[3]

Petitioners inaccurately assert that ten executives within the age group protected by the A.D.E.A. were fired, and that six (6) of the terminated individuals (i.e. all six Petitioners) were replaced; each purportedly being replaced by a younger man (Petitioners' Brief, page 3). In truth, of the executives listed as being terminated in Petitioners' exhibit the undisputed evidence demonstrates that health division marketing Vice President Hugh Eller, age 43, was succeeded by 56 year old life division Vice President Jim Wilson. Petitioner Galen, age 48,[4] was not replaced in his job as Eller's Assistant Vice President by 33 year old Tom Slack. Wilson divided Galen's job duties between Slack and 41 year old Bob Verplank (Tr. 925). Verplank was placed in charge of Galen's administrative responsibilities, while Slack was charged with responsibility for field sales operations (Tr. 925). Petitioner Galen conceded on cross-examination that he was aware of the division of his duties following his departure from the company (Tr. 123). Wilson had chosen Slack to head up field sales operations because Slack had an extremely successful sales track record over a ten year period of employment with the company (Tr. 919). In fact, Galen himself had promoted Slack through a series of significant field sales jobs; first to the District Sales Manager's

[3] The reason the complete exhibit is not reproduced is evident. The exhibit admitted at trial lists District Sales Managers. It reflects the fact that 12 of the company's 21 District Sales Managers were over the age of 40. Petitioner Heffer, at age 41, was the youngest District Sales Manager in the protected age bracket. District Sales Managers Williams (age 58), Craft (age 58), Stevens (age 51), Clark (age 48), Moore (age 47), Landrum (age 46), Evans (age 46), Crawford (age 46), Rucher (age 44) and Posey (age 43) all managed to survive the "scheme" or "pattern" espoused by Petitioners in their statement of the case.

[4] Petitioner Galen's date of birth is October 26, 1929 (Tr. 7). At the time that Wilson asked for Galen's resignation Galen was 48 years of age, not 49 as reflected in the text of Plaintiff's Exhibit 141-A.

job in Tyler, and thereafter to the Regional Sales Manager's job in San Antonio (Tr. 137, 139). Although in the case of each promotion Slack replaced managers that were approximately twelve to fourteen years his senior in age, Petitioner Galen emphasized that his decisions were not influenced by age—in each instance Slack was well qualified and merited the job (Tr. 138, 140).

At the Regional Sales Manager's level, Petitioner Jack Elliott, age 50, was in fact replaced by Royce Barron, age 34 (Tr. 24). This move, however, did not set any notable precedent in terms of variations in age between an incumbent and successor. Elliott conceded that his own promotion to the Regional Sales Manager's job in Houston involved the demotion of an individual named Bill Lockhart who had been twelve to fifteen years his senior (Tr. 304-305). As of October, 1978, Barron had been with the company in field sales capacities for over ten years; he held the Dallas North District Sales Manager's job prior to assuming Elliott's duties in Houston (Tr. 675-676).

In Dallas, Regional Manager Merle Owens, age 45, was replaced by 42 year old Paul David; hardly a move that could give rise to an inference of age discrimination.

Wilson's plan for the reorganization of the company's field marketing efforts called for the consolidation of the existing Austin and San Antonio regional offices, with the consolidated region to be based at the larger San Antonio location (Tr. 933). Austin Regional Sales Manager Lutz was offered the opportunity to stay in Austin in the capacity of a District Sales Manager (Tr. 933-934). Lutz turned down Wilson's proposal and resigned (Tr. 933).

In the category of District Sales Managers [not a classification listed in Petitioners' exhibit], Petitioner Heffer, age 41, was terminated as Houston North District Manager and replaced by Mike McGuire, age 35 (Tr. 220). The placement of McGuire as Houston North District Sales Manager constituted a lateral

transfer; McGuire had been functioning as District Manager of the company's Beaumont office (Tr. 683).

The Petitioners apparently assert that the termination of District Sales Manager Hollis should be included in the alleged "pattern" described in their statement of the case. Although Hollis is listed as a terminated District Sales Manager in the text of Plaintiffs' Trial Exhibit 141, Petitioners offered no testimony at trial concerning either the circumstances of Hollis' termination or the age of his replacement, if any. Thus, no valid inferences can be drawn from the termination of District Sales Manager Hollis.

At the company's Dallas headquarters office, changes were made in marketing staff positions. Petitioner Don Spradley, Manager of National Accounts, and Petitioner Duane Thompson, Sales Training Director, were terminated. Spradley, age 53, was replaced by Pat Patrick, age 39, while Thompson, age 48, was replaced by Ed Hulsey, age 36.

Petitioner Max Tipton stipulated that his situation was not part of any reorganization; he was discharged during the month of February, 1979, by field operations AVP Slack in an office space gerrymandering controversy; however, the termination decision was subsequently rescinded by Wilson, and Tipton was offered the alternative of accepting a demotion to sales representative or resigning (Tr. 473, 998). Tipton ultimately resigned; his position as Abilene Regional Sales Manager was not filled by 43 year old Jerry Bagwell. Rather, the Abilene regional office was closed and its functions consolidated with Bagwell's existing regional sales office headquartered in Lubbock (Tr. 949, 954).

Based on the foregoing, it becomes evident that the "pattern" described by Petitioners in their statement of the case has been drastically overstated; the facts in evidence do not match the Petitioners' expansive characterizations. Only Petitioners Elliott, Thompson and Spradley were undisputedly

replaced by younger employees. Petitioner Galen's job responsibilities were split, although it is conceded that the individuals who were given such responsibilities were younger than Galen. Sales Vice President Eller was replaced by an older employee, clearly a definitive break in the "pattern." Regional Managers Lutz and Tipton were not replaced, while Regional Manager Owens and Petitioner Heffer were replaced by employees that were only marginally younger (i.e. three and six years respectively).

The "pattern" analysis contained in the Petitioners' statement of the case also urges this Court to virtually ignore the obvious. It was undisputed that it had long been the practice of the company to promote from within its sales organization—the anticipated result of nearly all displacements would be the elevation of a younger employee in place of the incumbent. Under such circumstances, the weight, if any, to be attached to the "pattern" argued by Petitioners becomes minimal. As noted by the Court of Appeals, each Petitioner must carry his burden of persuasion by true evidence of discriminatory intent, not hollow exhortations (App. 20a).

Petitioners have offered their own rendition of the reasons for their terminations within the text of Petitioners' statement of the case. However, in many instances, the version of the facts offered by Petitioners contain significant omissions. The Respondent offers a brief summary of the record evidence and findings of the Court of Appeals relating to the reasons for the Petitioners' terminations as follows:

Marketing Vice President Jim Wilson asked for the resignation of Assistant Vice President Galen because he felt that Galen's good attributes were outweighed by his lack of loyalty (Tr. 921, 975). Specifically, Wilson felt that Galen, "... was too dedicated to Dick Galen's welfare as opposed to the welfare of the corporation." (Tr. 975). Wilson had learned from Walter Hachmeister that Galen had sought Hugh Eller's job while Eller was still Galen's boss (Tr. 923). Galen admitted

that he had, in fact, approached Walter Hachmeister with a "resume" of things he would do within the Marketing Division, "... if it were true that he [Eller] was going." (Tr. 96). Wilson stated that his request for Galen's resignation was keyed, in material part, to the undisputed fact that Galen had been, "... moving in a little too quick" [on Eller] and effectively "undermining his boss" (Tr. 923-924, 975). Galen conceded that before Wilson asked for his resignation many "political things" were discussed—in particular, Wilson wanted to know if Galen had in fact gone to Hachmeister concerning the possibility of ascending to Eller's job (Tr. 110-111). Wilson considered Galen's tenure, not his age, in weighing the decision to ask for Galen's resignation (Tr. 925-926). This testimony meshed with Galen's admissions on cross-examination that there was no mention by anyone of his being "too old" to do the job (Tr. 121). Petitioner Galen did not take the stand to present evidence that the reasons cited by Wilson for his discharge were pretextual in nature.

Petitioner Elliott surmised that his discharge came because, "... I guess I was just getting too old." (Tr. 293, 303). This supposition was offered despite Elliott's admissions that nothing concerning his age had ever been stated to him by individuals such as Hachmeister, Wilson or Slack (Tr. 333). On rebuttal, Jim Wilson testified that he approved the plan to reorganize the field marketing staff, with the design being to put "proper leadership into key roles," particularly in the critical Dallas and Houston market areas (Tr. 918). In Dallas, Regional Manager Merle Owens was terminated because, in Wilson's view, Owens simply did not have the, "drive, nor the initiative to really take that particular office ... and make them produce." (Tr. 927). In Houston, the reasons for Elliott's termination were the same. Wilson stated, "I do not feel that he [Elliott] was as productive as he could have been . . . " and "... Jack could have done a better job than he had done." (Tr. 929, 932). Wilson's perception of Elliott's lack of productivity was supported by undisputed evidence. Although the Houston region had far

exceeded its assigned quota during the year 1977 thanks to the sale of the Houston Independent School District account, the company's market penetration in Houston was only five to six percent (compared to a state-wide market penetration of twenty percent) (Tr. 681, 697). By the time Royce Barron was assigned to assume Elliott's duties in Houston as of late October, 1978, the region was devastatingly behind in attainment of its assigned quota, and the undisputed evidence showed that the year 1978 ended with the Houston region attaining only fifty-five percent of its assigned quota (Defendant's Trial Exhibit 33, Attachment "A" Region II). Petitioner Elliott offered no evidence of pretext, and in particular did not address the content of Defendant's Exhibit 33, or speak to the issues raised by Wilson and Barron concerning his region's market penetration and productivity as of the year 1978.

Petitioner Heffer testified that he felt that he was terminated from his job as the Houston North District Manager by Royce Barron due to his age because, "... they were looking for a young team." (Tr. 245). On cross-examination, however, Heffer conceded that Barron had never mentioned his age as being a factor (Tr. 263). In fact, Heffer conceded that Plaintiffs' Trial Exhibit 141 revealed that there were ten district managers elsewhere in the state who were older than him (Tr. 264). Royce Barron testified that it was clear to him from the moment he arrived in Houston that Heffer felt that the Houston Regional Manager's job should have gone to Heffer, not Barron (Tr. 687-688). As a result, Barron found Heffer's attitude toward him to be, "... standoffish, cold, unresponsive, and even a bit uncooperative." (Tr. 686, 724). Since Barron had been charged with turning the situation in the Houston region around on an immediate basis, he felt that he did not have the luxury of time to change Heffer's attitude toward him (Tr. 688-689, 693). Barron stated that he did not consider Heffer's age in connection with the termination decision; in fact, he noted that the difference in age between Heffer and his replacement,

Mike McGuire, was minimal (i.e. McGuire was less than six years Heffer's junior in age) (Tr. 690).

Sales Vice President Wilson testified that he approved the recommendation of Assistant Vice President Carl Owens regarding the termination of Petitioner Spradley from the job position of Manager of National Accounts (Tr. 937). Wilson stated that he "... did not feel that Don [Spradley] had the capabilities to really do the job as well as he should in national accounts." (Tr. 937). Wilson had sought the opinion of several other individuals within the administrative organization of the company concerning Spradley's job performance because he had not worked directly with Spradley for a number of years (Tr. 937-938). It was an undisputed fact that during the three years preceding his termination Spradley had been transferred into and out of a total of four different job positions (Tr. 343). These jobs included Assistant Vice President of Marketing Services, Assistant Vice President of Actuarial Services, a "special project" assignment, and, finally, a demotion to Manager of National Accounts. Petitioner Spradley conceded on cross-examination that his career with the company had been on a rocky foundation for a number of years; in fact, Spradley had not received a written evaluation of his job performance since July of 1975 (Tr. 348). Spradley further admitted that Jim Wilson's predecessor, Health Marketing Vice President Hugh Eller, had been critical of his job performance as Manager of National Accounts—Spradley confirmed that Eller criticized him for not being "more enthusiastic about the job" and admitted that Eller asked him to "provide better leadership" in the position (Tr. 381-382). On balance, Jim Wilson's opinion of Spradley's job performance during the years immediately preceding his termination simply mirrored Eller's criticisms (Tr. 937). Petitioner Spradley did not offer any testimony whatsoever to indicate that the criticisms that existed of him in the job of Manager of National Accounts were pretextual in nature.

Petitioner Thompson was Sales Training Director at the time of his termination (Tr. 408-409). Marketing Vice President Jim Wilson testified that he held the opinion that the existing sales training program, which was the responsibility of Thompson, "... was not anywhere as good as it should have been." (Tr. 939). Even Petitioner Galen conceded on cross-examination that, "... it is fair to say that we felt we needed to improve our sales training." (Tr. 152). On cross-examination, Thompson admitted that the sales training program had "really been neglected," and that he "was going to recommend many changes" to "revitalize the program" (Tr. 438, 461). Petitioner Thompson offered no evidence of pretext. Instead, he testified that he had prepared written proposals for the "revamping" of the sales training program as of approximately August, 1978 (Tr. 1055-1056). These ideas were purportedly submitted to AVP Bob Verplank during the fall of 1978; however, Verplank allegedly said that if the proposed training program contained any of Galen's ideas Thompson could just "trash them" (Tr. 1056). This sent Thompson "back to the drawing board," and he was allegedly devising a "second program" at the time of his termination (Tr. 1056). Marketing Vice President Wilson denied that Thompson's age was a factor in requesting Thompson's resignation (Tr. 939-940). After Thompson's termination, Wilson arranged to have the sales training budget increased, and a new program was developed which represented a "dramatic improvement" in Wilson's view (Tr. 942).

Petitioner Tipton conceded that his situation was not part of the reorganization of the Marketing Division; Tipton was terminated because he had undisputedly violated company policy by having a contractor who was remodeling his new regional offices leave out a wall, producing the twin effect of enlarging his personal office beyond the square footage permitted by the company for an employee of his rank and eliminating the employee's lounge (App. 20a). Although Petitioner Tipton testified that he felt as though his immediate

supervisor, Assistant Vice President Galen, had approved his proposed "revision" of the Abilene regional office floor plan, the testimony of Co-Petitioner Galen did not conform with Tipton's supposition. Instead of indicating that the "revision" had been approved, Petitioner Galen stated that his words were, "... well, you know, try it and we will see," or, "... if it flies, let it go through" (Tr. 129, 132). Marketing Vice President Jim Wilson testified that it had long been company policy that any changes to building plans had to be approved and signed off by the vice president of the division involved; AVPs such as Galen would not have the authority to approve such changes (Tr. 994). This was a fact that neither Galen nor Tipton challenged. The most damaging testimony to Tipton's cause came when the company offered Defendant's Trial Exhibit 37, and attachments, indicating that Tipton had approved and accepted the leasehold premises in Abilene containing a layout or floor plan with a separate employees' break room, a conference room, and a standard sized regional manager's office as of January 19, 1979; this was long *after* Galen had left the company (Tr. 994). Plaintiff Tipton offered no true evidence of age discrimination whatsoever. On rebuttal, he did not challenge the issue of the necessity of receiving approval from a full vice president to change a floor plan, nor did he address the obvious inferences raised by Defendant's Trial Exhibit 37.

The analysis of the state of the record evidence regarding the testimony of the Respondent's expert witness is also inaccurately assessed in Petitioners' statement of the case. While Petitioners correctly characterized the approach taken by Dr. Schucany and his findings, they inject disparaging remarks relating to his study by stating, "... the expert acknowledged that his analysis took no account of the ages of those who *replaced* the terminatees, and thus reflected nothing as to the probability of the random occurrence of *both* eight terminatees all being over 40 *and* their replacements being substantially

younger" (Tr. 883) (Petitioners' Brief, page 9). The Respondent states that it would have been of little value to have asked Dr. Schucany to run the test now belatedly contemplated by Petitioners because it is undisputed that the record evidence has *never* reflected the existence of eight "terminatees" who were replaced by eight "substantially younger" employees. As previously noted, of the eight employees in question, one (Eller) was replaced by an older employee, two (Lutz and Tipton) were not replaced, and one (Merle Owens) was replaced by an individual less than three years his junior. Thus, the statistical survey Petitioners apparently urge via their criticism of the approach of the Respondent's expert could not possibly be justified by the undisputed facts in evidence in this case.[5]

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[5] At another point in their brief, Petitioners argue for the inclusion of District Managers in a statistical analysis; matching their own "off the record" findings with a comment by the Circuit Court that is clearly not the basis of any conclusion regarding sufficiency of the evidence in this case (Petitioners' Brief, page 22, footnote 14). The analysis advanced by Petitioners is flawed from its inception because it ignores the undisputed evidence in this case, as well as the reasons why the Court of Appeals gave no particular weight to the testimony of Dr. Schucany. Of the ten terminations cited by Petitioners, at least six occurred under circumstances wherein there is no evidence supporting at least an initial inference of age discrimination (i.e. the replacement of a protected age bracket employee with a substantially younger individual). In short, the "numbers game" perpetrated by Petitioners has no foundation in either logic or proof.

ANALYSIS OF QUESTIONS PRESENTED FOR REVIEW BY PETITIONERS

Petitioners' First Question Restated

1. Whether, in an employment discrimination case, the testimony of an employer official that the challenged employment decision was prompted by a nondiscriminatory reason must be accepted absent "counter-vailing evidence that it was not the real reason for the discharge." (Stated otherwise, whether, in an employment discrimination case, the fact-finder (here the jury) is permitted to reject the uncontradicted testimony of an interested employer witness on the basis of its assessment that the witness is not credible.)

At the outset, it should be stated that Petitioners have mischaracterized the holding of the Court Appeals relating to this issue. Petitioners assert that the recognized province and function of a jury to weigh the credibility of witnesses was invaded by the Court of Appeals because it purportedly held that when a management representative of an employer takes the stand to testify to reasons for a discharge decision, "... that person's testimony that an innocent reason motivated an employment decision *must* be credited in the absence of 'counter-vailing evidence that it was the real reason for the discharge.'" (Petitioners' Brief, p. 18) (emphasis added).

Contrary to the Petitioners' contentions, the actual holding of the Court of Appeals was that in the absence of direct evidence of discriminatory treatment, a trier of fact is not free to disregard a rational non-discriminatory reason for a discharge decision, the basis of which is not seriously disputed or challenged by the plaintiff (App. 17a, 19a-20a).

The Court of Appeals specifically indicated that its analysis in this case was undertaken in compliance with the standards of proof delineated by this Court in *United States Postal Service Board of Governors v. Aikens*, U.S. , 103 S.Ct. 1478,

75 L.Ed.2d 403 (1983) (App. 15a). The holding of the Court of Appeals in this case is based upon a relatively simple and straightforward premise: a plaintiff who offers nothing more than a subjective belief that his discharge was the result of age discrimination and thereafter does not undermine or challenge rational reasons articulated by his employer for his termination has not presented evidence that justifies a submission to the jury for resolution of controverted fact and credibility issues. In fact, when a plaintiff fails to effectively challenge his employer's proffered reasons for a discharge decision and concedes instead, as in this case, the truth of the reasons stated by the employer, the plaintiff's evidence is patently insufficient to warrant an inference of discrimination under standards of proof enunciated by this Court in both *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981) and *United States Postal Service Board of Governors v. Aikens, supra.*[6]

There is no misapplication of the facts of this case to the law. Nor is there an element of the invasion of the province of the jury. The Court of Appeals simply weighed the evidence presented by Petitioners as it stood at the conclusion of this case and found:

> "... none seriously disputed either his awareness of or the objective truth of the company's stated ground of dissatisfaction with him, maintaining only that it was inadequate to warrant his termination. * * * Pretext was not made out, nor could reasonable jurors properly have concluded that it was." (App. 20a)

This Court's decision in *Texas Department of Community Affairs v. Burdine, supra,* requires more of a plaintiff than the Petitioners brought forward in this case. Under the requisites of

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[6] The Petitioners' argument regarding this issue is linked to the premise that the employer has presented only "otherwise uncorroborated testimony" (Petitioners' Brief, page 14). In fact, this premise is critical to Petitioners' argument. Here, however, the corroboration of the testimony of the company's witnesses came from Petitioners themselves (App. 20a-21a).

Burdine Petitioners could have succeeded in presenting proof of pretext necessary to justify submission of the case to a jury by offering rebuttal evidence showing either direct proof of discriminatory intent and motive, or indirect evidence showing that the employer's proferred explanation was unworthy of credence. *See Burdine,* 450 U.S. at 256, 101 S.Ct 1093, 67 L.Ed.2d 217. Instead, Petitioners offered nothing, with the Court of Appeals correctly noting:

> "In rebuttal, each appellee advanced little if anything more than his belief that age caused his discharge rather than the reason given by the employer. We are not prepared to hold that a subjective belief of discrimination, however genuine, can be the basis of judicial relief. *See Houser v. Sears, Roebuck and Co.,* 672 F.2d 756 (5th Cir. 1980). (App. 21a)

The Petitioners incorrectly assert that the Court of Appeals' decision in this case parallels the Fifth Circuit's treatment of the subject of sufficiency of evidence of anti-union motivation which was struck down by this Court in *N.L.R.B. v. Walton Mfg. Co.,* 369 U.S. 404, 82 S.Ct. 853, 7 L.Ed.2d 829 (1962). This Court's decision in *Walton Mfg. Co., supra,* has no application to this matter; it represents a review of the Fifth Circuit's handling of a labor board case under the substantial evidence rule criteria of the Supreme Court's decision in *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951).

In *Walton* this Court admonished the Court of Appeals that in the context of the review of a decision of an administrative agency a Circuit Court does not have the prerogative to substitute its analysis of the evidence for that of the agency so long as the Board's view is supportable by substantial record evidence. *Walton* thus speaks to the issue of deference to the Board's expertise in resolving the credibility of witnesses whose testimony is in sharp dispute; clearly not an issue in this case wherein Petitioners have neither disputed the substance of the objective reasons stated by the employer for their terminations, nor offered evidence of pretext.

The Petitioners additionally assert that their petition in this case should be granted because the Court of Appeals' decision here purportedly conflicts with a District of Columbia Circuit Court decision styled *Carter v. Duncan-Huggins, Ltd.*, F.2d , 34 FEP Cases 25 (D.C. Cir. 1984). This contention is likewise clearly in error. The decision of the Court of Appeals for the District of Columbia in *Duncan-Huggins* represents a review of a District Court ruling which denied an employer's Motion For Judgment N.O.V. following an adverse jury verdict in a discrimination suit brought under The Civil Rights Act of 1866, 42 U.S.C. Section 1981. In weighing the sufficiency of the evidence supporting plaintiff Carter's favorable jury verdict, the Circuit Court found that during the course of trial plaintiff had offered largely undisputed evidence that she had been treated differently from similarly situated Caucasian co-workers in a variety of terms and conditions of employment, wages, and subjection to a racially derogatory anecdote under circumstances wherein the company's president was present and found the joke humorous. *See* 34 FEP Cases at 28, 30-31. Although the defendant employer denied a discriminatory motive in plaintiff's treatment, the Circuit Court concluded that there was more than enough conflicting evidence inferring racial discrimination to justify submission of the case to the jury; in fact, the Circuit Court found that the evidence tended to show that plaintiff was "treated uniquely" in all aspects of her employment. *See* 34 FEP Cases at 30.

In *Duncan-Higgins*, the Court of Appeals for the District of Columbia adopted the same standard for its review of the sufficiency of the evidence as the Court of Appeals for the Fifth Circuit did in this case. The standard involved called for plaintiff Carter to present proof of discrimination under the criteria of *Texas Department of Community Affairs v. Burdine, supra*, and *United States Postal Service Board of Governors v. Aikens, supra*. *See* 34 FEP Cases at 29. The difference between the result in *Duncan-Huggins* and this case lies in the state of the record evidence. In *Duncan-Huggins*, the Circuit Court

rightfully concluded that the employer's defensive statements simply articulated a "different version of the facts"; facts that were sharply disputed and which were correctly submitted to the jury for resolution. In this case, facts essential to a showing of pretext were never forthcoming from Petitioners (App. 21a). There were thus no facts raised by Petitioners herein which required a resolution of credibility by the jury. To the contrary, as noted in both the Respondent's statement of the case and the Circuit Court's decision, each Petitioner virtually stipulated to the truthfulness and accuracy of the reasons stated by the company for the termination decisions (App. 20a). Their assertions of age discrimination were based entirely upon a subjective belief in the existence of the "pattern" urged in Petitioners' statement of the case—a "pattern" which does not exist in the form Petitioners contend.

The Respondent would call to this Court's attention the fact that there have been at least two recent Circuit Court decisions wherein this Court has denied petitions for certiorari on points that should be considered nearly identical to those raised by Petitioners in this case. These cases are *Pace v. Southern Railway System*, 701 F.2d 1383 (11th Cir. 1983), cert. denied, U.S. , 104 S.Ct. 1334 (1984), and *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3rd Cir. 1983), cert. denied, U.S. , 104 S.Ct. 348 (1983). Both cases address the issue of the sufficiency of proof necessary to justify the submission of a case to a jury in an age discrimination lawsuit context. The observations offered by the Court of Appeals for the Eleventh Circuit in *Pace v. Southern Railway System, supra*, are particularly relevant:

> "A plaintiff, when faced with a motion for summary judgment, cannot rely on attenuated possibilities that a jury would infer a discriminatory motive, but rather must come forward with sufficient evidence to establish a prima facie case and respond sufficiently to any rebuttal by the defendant to create a genuine issue of material fact. Even where a prima facie case has been established but the defendant has rebutted with a proffer of legitimate, non-

> discriminatory reasons for the discharge, a genuine issue of material fact is not automatically presented. As the Supreme Court noted in *Texas Department of Community Affairs v. Burdine*, 450 U.S. at 254 n. 7, 101 S.Ct at 1094 n. 7, once established a prima facie case creates a rebuttable presumption of discrimination; but this presumption alone does not create an inference that a material fact, sufficient to present a jury question, is in issue." [701 F.2d at page 1390]

In *Pace*, plaintiff relied primarily on statistical studies that he argued inferred a "pattern" of age discrimination in demotion and transfer decisions of the company. As in this case, the Court of Appeals found the statistical evidence to be inconclusive, and looked to plaintiff to bear his ultimate burden of proof in offering at least some evidence of pretext as required by *Texas Department of Community Affairs v. Burdine, supra.*

The Third Circuit's decision in *Massarsky v. General Motors Corp., supra,* presents the same conclusion in a slightly different context. Plaintiff Massarsky argued for the application of a disparate impact theory in his case based on assertions that his layoff was the result of an age-biased policy that purportedly exempted young employees who were enrolled in the General Motors Institute (GMI). The Circuit Court concluded that whether plaintiff Massarsky was held to a disparate impact standard of proof or that of a disparate treatment theory was immaterial; plaintiff simply failed to carry his ultimate burden of proof.

Significantly, the Circuit Court decisions in both *Pace* and *Massarsky* also fully comport with the approach to this subject taken by the Court of Appeals for the Ninth Circuit in *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983), wherein the Circuit Court affirmed the grant of a motion for summary judgment—specifically rejecting plaintiff's argument that a summary judgment cannot be granted if a prima facie case is established. Following the principles of *Texas Department of Community Affairs v. Burdine, supra,* the Ninth Circuit correctly

concluded that, "... plaintiffs in ADEA cases must tender a genuine issue of material fact as to pretext in order to avoid summary judgment." [703 F.2d at 393].

Based on the foregoing, it should be found that the Court of Appeals for the Fifth Circuit correctly applied the law of this Court in reaching its conclusions regarding the sufficiency of evidence herein, and its conclusions should be implicitly affirmed by the rejection of Plaintiffs' question presented for review under this issue.

Petitioners' Second Question Restated

2. Whether, in an age discrimination case, evidence that an employer has dismissed a number of highly qualified older employees and replaced them with much younger employees may be considered by the fact-finder, in the absence of a showing that as a matter of probability the pattern is "statistically significant."

In similarity to question number one presented by Petitioners, this question deals with the alleged invasion of the province of the jury by the Court of Appeals in this matter. Specifically, the Petitioners contend that the Circuit Court has effectively ruled that evidence of an alleged "pattern" of action purportedly inferring discrimination may not be considered by the fact-finder (i.e. the jury) without accompanying evidence that the "pattern" has statistical significance (Petitioners' Brief, p. 25).

Once again, the Respondent is compelled to strenuously assert that Petitioners have mischaracterized the actual holding of the Circuit Court. The finding of the Court of Appeals relating to the testimony of the Respondent's expert witness was that his testimony, "... established only that age could neither be ruled in nor ruled out statistically as the factor leading to the discharges." (App. 18a). Although the Circuit Court noted that the expert testimony tended to undercut the theory that age was a determining factor in any of the employment decisions in this case, the Court constrained its actual finding regarding the probative value of the expert's testimony by indicating,

"... Schucany's testimony concerning his statistical model, as noted above, was that age could neither be accepted nor rejected as the determinative factor in the discharges." (App. 19a, n. 12).

Since the Court of Appeals' true finding concerning the probative value of the expert testimony was that "the statistical evidence was equivocal" it cannot reasonably be asserted by Petitioners that the statistical proof present in this case was used by the Court of Appeals to summarily reject the Petitioners' "pattern of discrimination" evidence (App. 20a). Contrary to the suggestion of Petitioners, the Circuit Court did not rely on either *Castaneda v. Partida,* 430 U.S. 482, 97 S.Ct. 1272, 51 L.Ed.2d 498 (1977), or *Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), in reaching any "conclusion" that "... it was improper to consider plaintiffs' evidence that the terminations were part of a pattern." (Petitioners' Brief, page 22). No such finding was made by the Circuit Court.

The Petitioners' argument relating to the second question presented for this Court's review seems to belie a misunderstanding of the proper allocation of the burden of proof in a discrimination case once all evidence has closed. Specifically, assuming arguendo that the "pattern" of age discrimination alleged by Petitioners has some probative value contributing to the establishment of a prima facie case, Petitioners must still carry their ultimate burden of proof in offering evidence, either directly or indirectly, that would tend to show that the reasons proferred by the employer for the employment decisions in question were pretextual in nature. The requirements of *Texas Department of Community Affairs v. Burdine, supra,* dictate that a plaintiff must challenge an articulated reason for an allegedly discriminatory decision. In this case, the fact that a number of older employees were replaced with younger employees is not sufficient, standing alone, to justify submission of the case to a jury under circumstances wherein each and every Plaintiff

failed to offer proof of pretext. Plaintiffs are essentially contending that the "pattern" they allege should be considered viable evidence of age discrimination in the absence of any other element of age discrimination in this case. This category of assertion flies in the face of logic. A mere statement of a belief in a "pattern" of discrimination must be viewed as a totally subjective allegation unsupported by true substantive evidence of discriminatory intent.

Petitioners urge this Court to grant a writ of certiorari regarding the issue raised by this question because the decision of the Court of Appeals in this case is allegedly in conflict with the decision of the Sixth Circuit in *Marsh v. Eaton Corp.*, 639 F.2d 328 (6th Cir. 1981), and the decision of the Court of Appeals for the District of Columbia in *Carter v. Duncan-Huggins, Ltd.*, F.2d , 34 FEP Cases 25 (D.C. Cir. 1984). Neither Circuit Court decision cited by Petitioners has any bearing whatsoever on the decision of the Court of Appeals for the Fifth Circuit in this case. Specifically, neither case deals with the weight or sufficiency of statistically insignificant "pattern" evidence in the context of a plaintiff having offered absolutely no other probative evidence of discrimination, and, in particular, no evidence of pretext in attempting to carry the ultimate burden of persuasion under the criteria of *Texas Department of Community Affairs v. Burdine, supra.*

Marsh v. Eaton Corp., supra, involved a non-jury case wherein plaintiff raised allegations of sex discrimination under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.* The District Court had concluded that plaintiff's statistical evidence did not establish a prima facie case of sex discrimination because the sampling produced by plaintiff was too small to allow valid inferences of discrimination. The Court of Appeals for the Sixth Circuit disagreed, and found that although plaintiff's statistical proof involved limited numbers, the plaintiff at least had established

a prima facie case of "channeling" new hires to their initial job assignments on the basis of gender. The Sixth Circuit reversed and remanded this portion of the case conditioned on admonitions to the District Court and the parties as follows:

> "The conclusion that Plaintiff has established a prima facie case of sex discrimination does not settle the case. The Defendant is free to rebut the inferences presented by these statistics. * * * Once Plaintiff establishes a prima facie case of sex discrimination, the burden shifts to Defendant to rebut Plaintiff's evidence. Accordingly, we reverse the District Court and remand to allow Defendants the opportunity to rebut the prima facie case through attack on the statistical foundation, evidence of business purpose or other rebutting evidence." [639 F.2d at p. 328-329]

Based on the foregoing, it is clear that *Marsh* is not a case that speaks to the probative value of "pattern evidence" deemed to be statistically insignificant. More importantly, *Marsh* does not speak to the role that "pattern" evidence should play, if any, in determining whether a plaintiff has met the ultimate burden of proof required of a plaintiff in an employment discrimination case as of the close of all evidence.

In *Carter v. Duncan-Huggins, Ltd., supra,* the Court of Appeals for the District of Columbia concurred with the District Court's conclusion that plaintiff's evidence of disparate treatment should not be labeled as "statistical" evidence because plaintiff Carter, "... did not abstract from these figures any statistical pattern or practice or calculate any subtle but discriminatory impact." *See* 34 FEP Cases at 32. As noted in response to Petitioners' first question presented for review, the jury verdict in favor of plaintiff in the *Duncan-Huggins, Ltd.* case was affirmed on the basis of the sufficiency of plaintiff's evidence at each and every stage of the inquiries relating to sufficiency of proof. The analysis of the case undertaken by the Court of Appeals for the District of Columbia comported fully with the requirements of both *Texas Department of Community*

Affairs v. Burdine, supra, and *United States Postal Service Board of Governors v. Aikens, supra.* Under any fair minded analysis, *Duncan-Huggins, Ltd.* has no application to this case because plaintiff carried her ultimate burden of proof.

The Respondent argues that recent Circuit Court decisions dealing with this issue include *Pace v. Southern Railway System, supra,* and *Massarsky v. General Motors Corp., supra,* both of which are cited and discussed in response to Petitioners' first question. In *Pace* the Court of Appeals for the Eleventh Circuit rejected the notion that statistically inconclusive evidence of an alleged "pattern" of discriminatory employer action should be allowed to go to the jury in the absence of a showing of pretext. This Court has refused applications for writs of certiorari in both *Pace* and *Massarsky;* the issues presented by Petitioners under this question are not new and should not be found persuasive.

In this proceeding whatever value the assertion of a "pattern" of age discrimination had in furtherance of Petitioners' prima facie case was literally destroyed by Petitioners' complete failure to challenge the reasons offered by the employer for the discharge decisions as being pretextual in nature. As noted in *Texas Department of Community Affairs v. Burdine, supra,* the burden is always on a plaintiff to carry the production of persuasive evidence. Once the trial reaches the third stage of proof wherein a plaintiff has the burden of producing evidence of pretext the factual inquiry "proceeds to a new level of specificity." (*Burdine,* 450 U.S. at 255). Here, the Court of Appeals found that pretext simply was not made out (App. 20a). Petitioners would apparently like for this Court to conclude that their bald allegations of a purported "pattern" of age discrimination should have been submitted, standing alone, to the jury notwithstanding the total absence of evidence of pretext. Plaintiffs would prefer that the evidence be treated in a piecemeal fashion, and assert that the Court of Appeals for the Fifth Circuit should be condemned for following the teachings

of *Burdine* and *Aikens* in analyzing the evidence as it stood at the close of the case. This Court should reject Petitioners' approach, and the denial of this question would serve to reaffirm the fact that the Circuit Court reviewed this case under the "same standards as those in other cases" as required by *Aikens*.

Petitioners' Third Question Restated

> 3. Whether, in an employment discrimination case, where the Plaintiff has introduced evidence establishing a prima facie case and an official of the defendant employer testifies to a facially-rational non-discriminatory reason for the challenged employment decision, the Plaintiff bears a "heavy burden" of proof that the proffered reason is pretextual.

The Respondent asserts that Petitioners' final question presented in connection with this application is offered more as a matter of form than real substance. Petitioners know that the Court of Appeals specifically stated in the text of its opinion that this case was measured "under the same standard as those in other cases" pursuant to the requirements of this Court's decision in *United States Postal Service Board of Governors v. Aikens*, U.S. 103 S.Ct. 1478, 75 L.Ed. 403 (1983) (App. 15a).

There is no ruling by the Circuit Court in this case that Petitioners were held to a "heavy burden" to prove pretext. In truth, the Circuit Court was never called upon to judge the probative quality of Petitioners' proof of pretext because there was none (App. 20a-21a). Under such circumstances, it cannot be fairly stated, as urged by Petitioners, that this case forges some new or especially onerous ruling regarding the sufficiency of proof of pretext in an employment discrimination case. The fact of the matter is that the decision of the Court of Appeals does not deal with any aspect of such a topic. Thus, Petitioners' third and final question raised for the proposed review of this Court should be rejected on the basis of lack of substantive merit.

CONCLUSION

The Respondent urges this Court to deny Petitioners' application in this matter based on findings that the Court of Appeals properly applied the law to the facts herein. Petitioners' questions presented for review do not raise substantive issues requiring resolution by this Court, nor does the decision of the Court of Appeals in this case conflict with that of any other Court of Appeals.

Respectfully submitted,

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